Macronet Sdn Bhd v RHB Bank Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D2–22–3134 OF 1999
ABDUL AZIZ J
24 MAY 2002

Contract *— Termination — Validity — Effect of extension of time to complete agreement — Whether termination after several extensions valid — Whether plaintiffs could rely on defendants' and its predecessors' representations to show wrongful termination*

Contract *— Terms — Entire agreement clause — Whether entire agreement clause barred or disqualified plaintiffs from applying exceptions in s 92(b) or (c) of Evidence Act 1950*

Evidence *— Parol evidence rule — Oral agreement — Exceptions to s 92 of Evidence Act 1950 — Whether oral agreement came within exceptions (b) and/or (c) of s 92 — Whether entire agreement clause barred or disqualified plaintiffs from applying exceptions in s 92(b) or (c) — Evidence Act s 92, (b), (c)*

The plaintiffs sought an injunction to restrain the defendant bank from disposing 5,508,000 shares ('the shares') held by the defendants in Sin Heng Chan (Malaya) Bhd ('SHCB'). By an agreement on 21 April 1995, the plaintiffs had purchased the shares from Rakyat Merchant Bank Bhd ('RMBB'). The plaintiffs paid two deposits and the balance was to be paid by 21 October 1995. Time was of the essence. Clause 12 provided for one extension of six months, subject to payment of interest. RMBB's assets and liabilities became vested in BSN Merchant Bank Bhd ('BSNMB') and subsequently in the defendants. Throughout this period, several extensions of the time were given to the plaintiffs to pay the balance of the purchase price but the plaintiffs continued to default. After the expiry of the fifth extension, the plaintiffs did not apply for an extension, and the defendants also did not immediately take steps to terminate the agreement. On 13 May 1999, the defendants served the plaintiffs with a notice of termination of the agreement under cl 18.01. The plaintiffs maintained that the termination of the agreement was not valid and that they were induced to execute the agreement based on two representations, ie: (i) that Bank Negara Malaysia ('BNM') would be in a position to do all things necessary to facilitate any reasonable proposal to restructure SHCB and obtain the requisite approvals from the relevant authorities ('the first precontractual representation'); and (ii) that RMBB would postpone the plaintiff's payment obligations pending the restructuring of SHCB ('the second precontractual representation'). The plaintiffs also relied on an oral agreement between the plaintiffs and RMBB that the date for the completion of the sale and purchase agreement would be extended until the completion of the restructuring of SHCB, provided that the plaintiff pays interest ('the oral agreement') and a subsequent agreement

between the parties that the interest payable would be capitalized and paid together with the balance purchase price upon completion of the restructuring ('the capitalization of interest agreement'). The plaintiffs also stated that time was no longer of the essence due to the several extensions. A

Held, dismissing the plaintiffs' application with costs: B

(1) To succeed in obtaining an injunction to restrain the defendants from disposing of the shares, the plaintiffs must show that there was a serious question to be tried whether the agreement had been validly terminated (see p 20B).

(2) The first precontractual representation would have been a representation as to what BNM would or could do as BNM, and not as the alter ego of RMBB. The plaintiffs could not use that representation against RMBB or, consequentially, against BSNMB and the defendants (see pp 21H, 22A). However, the second precontractual representation would have been a representation by RMBB to the plaintiffs because it was a representation as to a matter within RMBB's power (see p 22B). C D

(3) There was no evidence of the alleged capitalization of interest agreement. The correspondence did provide evidence that interest was capitalized on occasions but there was no evidence of any agreement that the interest or the balance purchase price was to be paid only upon restructuring of SHCB. Thus, the plaintiffs could not rely on the first precontractual representation, and there was no evidence of the capitalization of interest agreement. What was left to consider were, therefore, the second precontractual representation and the oral agreement (see p 23E–G). E F

(4) The court was unable to agree that the second precontractual representation and the oral agreement did not contradict the agreement. Their effect, assuming that they were in fact made and that the defendants were bound by them, was that the defendants would not be able to terminate the agreement for non-completion until SHCB has been restructured. The effect was to contradict the agreement because according to the agreement, the defendants would be able to terminate it for non-completion if the plaintiffs failed to complete by the end of the first extension of six months (see p 24A–C). G

(5) Section 92 of the Evidence Act 1950 stated that 'no evidence of any oral agreement or statement shall be admitted ... for the purpose of contradicting, varying, adding to, or subtracting from its terms', but the proviso to the section laid down several exceptions by virtue of which certain matters may be proved. The plaintiffs, before they could aspire to overcome the hurdle of showing that the second precontractual representation and the oral agreement fell within exceptions (b) or (c), must first overcome the hurdle of showing that cl 20.01 ('the entire H I

A agreement clause') did not bar or disqualify them from attempting the first mentioned hurdle (see p 24D, H–I).

(6) The plaintiffs argued that the entire agreement clause was no more than what was laid down in s 92. That was clearly not right as the effect of the entire agreement clause was to exclude any B variation of the agreement by an oral agreement. Any variation must be by another written agreement. But s 92 would allow the agreement to be contradicted or varied by an oral agreement or statement if it fell within any of the exceptions. The plaintiffs had, therefore, not shown that the entire agreement clause did not disqualify them from attempting to resort to exceptions (b) or (c) C in s 92. By agreeing to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They could not, therefore, be allowed to prove the second precontractual representation or the oral agreement and to rely on them (see p 25D–H).

D (7) The court was left to consider whether evidence of the second precontractual representation could be admitted despite the entire agreement clause. In the absence of submission by the plaintiffs on this specific point, the court followed the decision in *The Inntrepreneur Pub Co Ltd v East Crown Ltd* The Times Law Report, 5 September 2000. Taking the second precontractual E representation as a collateral warranty, according to the decision, the entire agreement clause denuded it of legal effect (see pp 27C, 28A).

(8) The oral agreement did not fall within exception (b). To fall within exception (c), the oral agreement must constitute 'a F condition precedent to the attaching of any obligation' under the agreement. The restructuring of SHCB was the condition precedent to be fulfilled. Prima facie, therefore, the oral agreement fell within exception (c). Were it not for the entire agreement clause, the plaintiffs may prove the existence of the oral agreement to argue that the notice of termination of the G agreement was in breach of the oral agreement and was therefore void and unenforceable. But, in view of the entire agreement clause, they could not bring in the oral agreement and they fail on their foremost ground for contending that the notice of termination was null and void (see pp 28C–E, 29B–C).

H (9) Time continued to be of the essence even with the extensions. Clause 12.03 of the agreement provided that 'whenever time is extended for payment of the balance of the purchase price, the completion date for the purpose of this agreement shall be construed accordingly'. Each extension was until a fixed date which became the new completion date. The completion date I kept being extended but the new time for completion continued to be of the essence. It was unreasonable of the plaintiffs, after enjoying a period of one year of freedom from demand by the

defendants, to expect the defendants, when they eventually decided to give the notice of termination, to give the plaintiffs another six months to pay (see p 29E–F, H). A

(10) There was no serious question to be tried as to whether the agreement was validly terminated. It was validly terminated. The plaintiffs were therefore not entitled to the interlocutory injunction that they sought (see pp 29I–30A). B

[Bahasa Malaysia summary

Plaintif-plaintif telah memohon untuk injunksi untuk menghalang defendan-defendan dari menjual 5,508,000 saham ('saham tersebut') yang dipegang oleh defendan-defendan dalam Sin Heng Chan (Malaya) Bhd ('SCHB'). Melalui suatu perjanjian pada 21 April 1995, plaintif-plaintif telah membeli saham-saham tersebut daripada Rakyat Merchant Bank Bhd ('RMBB'). Plaintif-plaintif telah membayar dua deposit dan baki tersebut dikehendaki dibayar pada 21 Oktober 1995. Masa adalah intipati bagi perjanjian tersebut. Klausa 12 memperuntukkan satu perlanjutan masa selama enam bulan, tertakluk kepada pembayaran faedah. Aset dan liabiliti RMBB telah diletakhakkan pada BSN Merchant Bank Bhd ('BSNMB') dan selanjutnya pada defendan-defendan. Selama jangka masa ini, plaintif-plaintif telah diberi beberapa perlanjutan masa untuk menjelaskan bayaran tetapi plaintif-plaintif masih ingkar menjelaskan bayaran tersebut. Setelah peluputan perlanjutan kelima, plaintif-plaintif tidak memohon perlanjutan masa seterusnya dan defendan-defendan juga tidak serta-merta menamatkan perjanjian tersebut. Pada 13 Mei 1999, defendan-defendan telah menyampaikan kepada plaintif-plaintif satu notis penamatan perjanjian tersebut di bawah kl 18.01. Plaintif-plaintif telah menyatakan bahawa penamatan perjanjian tersebut tidak sah dan bahawa mereka telah didorong untuk menyempurnakan perjanjian tersebut berdasarkan dua representasi, iaitu: (i) bahawa Bank Negara Malaysia ('BNM') akan melakukan apa yang perlu untuk memudahkan sebarang cadangan untuk menyusun semula SHCB dan untuk memperoleh kelulusan daripada pihak berkuasa yang relevan ('representasi prakontrak pertama'); dan (ii) bahawa RMBB akan menunda obgligasi pembayaran plaintif sementara menunggu penyusunan semula SHCB ('representasi prakontrak kedua'). Plaintif-plaintif juga bergantung kepada suatu perjanjian lisan di antara plaintif-plaintif dan RMBB bahawa tarikh penyelesaian perjanjian jual beli tersebut akan dilanjutkan sehingga penyelesaian penyusunan semula SHCB jika plaintif-plaintif membayar faedah ('perjanjian lisan tersebut') dan satu perjanjian selanjutnya di antara parti-parti bahawa faedah akan dipermodalkan dan dibayar bersama harga pembelian yang masih belum dijelaskan pada penyelesaian penyusunan semula ('perjanjian permodalan faedah tersebut'). Plaintif-plaintif juga menyatakan bahawa masa C D E F G H I

A bukan merupakan intipati memandangkan perlanjutan masa-perlanjutan masa tersebut.

Diputuskan, menolak permohonan plaintif-plaintif dengan kos:

B (1) Untuk memperoleh injunksi untuk menghalang defendan-defendan daripada menjual saham tersebut, plaintif-plaintif perlu menunjukkan bahawa terdapat persoalan serius untuk dibicarakan sama ada perjanjian tersebut ditamatkan dengan sah (lihat ms 20B).

C (2) Representasi prakontrak pertama tesebut merupakan representasi berkenaan dengan apa yang dapat dilakukan oleh BNM sebagai BNM, dan bukan sebagai RMBB. Plaintif-plaintif tidak boleh menggunakan representasi tersebut terhadap RMBB ataupun terhadap BSNMB dan defendan-defendan (lihat ms 21H, 22A). Akan tetapi, representasi prakontrak kedua merupakan representasi oleh RMBB kepada plaintif-plaintif kerana ia D merupakan representasi kepada suatu perkara di dalam kuasa RMBB (lihat ms 22B).

(3) Tidak terdapat bukti perjanjian permodalan faedah. Surat-menyurat menunjukkan bukti bahawa faedah telah dipermodalkan pada masa-masa tertentu, tetapi tiada bukti yang E menunjukkan perjanjian di mana faedah atau baki harga pembelian hendak dibayar hanya setelah SHCB disusun semula. Oleh itu, plaintif-plaintif tidak dapat bergantung kepada representasi prakontrak pertama, dan tiada bukti perjanjian permodalan faedah. Hanya tinggal representasi prakontrak kedua dan perjanjian lisan untuk ditimbangkan (lihat ms 23E–G).

F (4) Mahkamah tidak dapat bersetuju bahawa representasi prakontrak kedua dan perjanjian lisan tersebut tidak menyangkal perjanjian tersebut. Kesannya, jikalau ia benar-benar dibuat dan jikalau defendan-defendan terikat kepadanya, defendan-defendan tidak akan dapat menamatkan perjanjian tersebut kerana kegagalan G dalam menyempurnakannya sehingga SHCB telah disusun semula. Kesannya adalah menyangkal perjanjian tersebut kerana berdasarkan perjanjian tersebut, defendan-defendan boleh menamatkan perjanjian tersebut kerana kegagalan men-yempurnakan perjanjian tersebut jika pihak-pihak masih tidak menyempurnakannya pada akhir tempoh perlanjutan enam bulan H pertama (lihat ms 24A–C).

(5) Seksyen 92 Akta Keterangan 1950 menyatakan bahawa 'no evidence of any oral agreement or statement shall be admitted ... for the purpose of contradicting, varying, adding to, or subtracting from its terms', tetapi proviso kepada seksyen tersebut mempunyai beberapa pengecualian melalui mana perkara-I perkara tertentu boleh dibuktikan. Sebelum plaintif-plaintif dapat menunjukkan bahawa representasi prakontrak kedua dan perjanjian lisan adalah termasuk dalam pengecualian (b) atau (c),

plaintif-plaintif mesti menunjukkan bahawa kl 20.01 ('klausa perjanjian seluruh') tidak menghalang atau menghilangkan kelayakan mereka untuk menggunakan pengecualian di dalam s 92 Akta Keterangan 1950 (lihat ms 24D, H–I). A

(6) Plaintif-plaintif telah menyatakan bahawa klausa perjanjian seluruh tersebut adalah sama dengan s 92. Adalah jelas bahawa ini tidak betul kerana klausa perjanjian seluruh tersebut tidak membenarkan perubahan perjanjian tersebut melalui perjanjian lisan. Sebarang perubahan hendaklah dibuat oleh perjanjian bertulis. Akan tetapi s 92 membolehkan perjanjian tersebut disangkal atau diubah oleh perjanjian lisan ataupun pernyataan jika ia termasuk ke dalam pengecualian-pengecualian. Plaintif-plaintif tidak menunjukkan bahawa klausa perjanjian seluruh tersebut tidak menghilangkan kelayakan mereka daripada menggunakan pengecualian (b) atau (c) dalam s 92. Plaintif-plaintif telah bersetuju supaya tidak menggunakan pengecualian di dalam s 92 kerana telah bersetuju kepada klausa perjanjian seluruh tersebut. Plaintif-plaintif tidak dapat dibenarkan membukti atau bergantung kepada representasi prakontrak kedua ataupun perjanjian lisan (lihat ms 25D–H). B C D

(7) Mahkamah dikehendaki membuat pertimbangan sama ada bukti representasi prakontrak kedua boleh diterima walaupun adanya klausa perjanjian seluruh tersebut. Dengan ketiadaan penghujahan oleh plaintif-plaintif di atas perkara ini, mahkamah telah mengikut keputusan di dalam *The Inntrepreneur Pub Co Ltd v East Crown Ltd* (Times Law Report, 5 September 2000). Mengikut keputusan tersebut, mengambil representasi prakontrak kedua sebagai waranti kolateral, klausa perjanjian seluruh tersebut menidakkan kesan undang-undang representasi prakontrak tersebut (lihat ms 27C, 28A). E F

(8) Perjanjian lisan tidak termasuk ke dalam pengecualian (b). Untuk terjumlah kepada pengecualian (c), perjanjian lisan tersebut mestilah menjadi 'a condition precedent to the attaching of any obligation' di bawah perjanjian tersebut. Penyusunan semula SHCB merupakan syarat terdahulu yang perlu disempurnakan. Perjanjian lisan, prima facie, termasuk ke dalam pengecualian (c). Plaintif-plaintif boleh membuktikan perjanjian lisan tersebut untuk menyatakan bahawa notis penamatan perjanjian tersebut melanggar perjanjian lisan dan adalah tidak sah dan tidak dapat dikuatkuasakan, jika tidak kerana klausa perjanjian seluruh tersebut. Akan tetapi oleh kerana klausa perjanjian seluruh tersebut, mereka tidak dapat membawa masuk perjanjian lisan dan mereka gagal dalam menyatakan bahawa notis penamatan tersebut terbatal dan tidak sah (lihat ms 28C–E, 29B–C). G H

(9) Masa merupakan intipati walaupun terdapat perlanjutan masa. Klausa 12.03 perjanjian tersebut memperuntukkan bahawa 'whenever time is extended for payment of the balance of the I

purchase price, the completion date for the purpose of this agreement shall be construed accordingly'. Setiap perlanjutan masa adalah sehingga tarikh yang ditetapkan yang menjadi tarikh penyelesaian yang baru. Tarikh penyelesaian masih dilanjutkan tetapi masa penyelesaian baru masih merupakan intipati. Adalah tidak munasabah bagi plaintif-plaintif, setelah mengalami tempoh selama setahun bebas daripada tuntutan oleh defendan-defendan, untuk berharap bahawa defendan-defendan akan melanjutkan tempoh masa selama enam bulan lagi apabila defendan-defendan memberikan notis penamatan (lihat ms 29E–F, H).

(10) Tiada soalan yang serius untuk dibicarakan sama ada perjanjian tersebut telah ditamatkan dengan sah. Ia ditamatkan dengan sah. Plaintif-plaintif tidak berhak kepada injunksi interlokutari yang dipohon (lihat ms 29I–30A).]

Notes

For cases on validity of termination of contract, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3901–3902.

For cases on terms, see 3(2) *Mallal's Digest* (4th Ed, 2000 Reissue) paras 3905–4048.

For cases on admissibilty of oral agreement under the parol evidence rule, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1758–1761.

Cases referred to

Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd [1965] 2 All ER 65 (refd)

Hope v RCA Photophone of Australia Proprietary Ltd (1937) 59 CLR 348 (refd)

Inntrepreneur Pub Co Ltd v East Crown Ltd The Times Law Report, 5 September 2000 (folld)

Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor [1992] 2 MLJ 68 (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 50(1), 73(2)(a), 76(4)
Evidence Act 1950 s 92

Balvinder Singh Kenth (*Sri Ram & Co*) for the plaintiffs.

Wong Kian Kheong (*Andrew Chiew* with him) (*Lee Hishammuddin*) for the defendants.

Abdul Aziz J: By the present summons in chambers, the plaintiffs seek an injunction to restrain the defendant bank from disposing of 5,508,000

ordinary shares held by the defendants in Sin Heng Chan (Malaya) Bhd ('SHCB'), a public company whose shares are listed on the main board of the Kuala Lumpur Stock Exchange. The 5,508,000 SHCB shares ('the shares'), were originally the property of Rakyat Merchant Bank Bhd ('RMBB'). They became subject to an agreement made on 21 April 1995 between RMBB and the plaintiffs ('the agreement') for their sale by RMBB to the plaintiffs for RM103,656,921.63 (RM18.82 per share). Through sales of business given effect to by orders of court under s 50(1) of the Banking and Financial Institutions Act 1989 ('the BAFIA'), the shares and the agreement devolved on the defendants on 7 November 1996 when their name was DCB Bank Bhd. The institution by the plaintiffs of their action in this case and their making of the present application for an injunction were in consequence of a move by the defendants to terminate the agreement for its alleged breach by failure to pay the balance of the purchase price and interest thereon. The plaintiffs maintain that the termination of the agreement was not valid and they hope through the action to obtain, besides other reliefs, specific performance of the agreement. They maintain that if the shares were disposed of, damages would not be adequate for them because the shares constitute almost 30% of the issued and paid up shares of SHCB, and therefore represent a controlling block.

Within 14 days from the date of the agreement, the plaintiffs paid two deposits totalling RM10,365,692.16, leaving, of the purchase price, a balance of RM93,291,229.47, which, according to cl 8.01(c) of the agreement, was to be paid by 21 October 1995, but cl 12 provided for one extension of six months subject to payment of interest. Time was of the essence.

On 1 August 1995, less than four months after the agreement was executed, RMBB's assets and liabilities, following a sale of business, vested in BSN Merchant Bank Bhd ('BSNMB') by a vesting order under s 50(1) of the BAFIA. So BSNMB succeeded to the shares and the agreement in place of RMBB.

There were five extensions of the time to pay the balance of the purchase price, which initially should have been paid by 21 October 1995. The first was the extension of six months as of right under cl 12. For some reason which is not relevant or material, that extension was treated as expiring on 3 April 1996. Subsequent extensions were granted at the request of the plaintiffs. The second extension was from 3 April 1996 until 3 October 1996. The third was from 4 October 1996 until 3 April 1997. The second extension was granted by RMBB although BSNMB had already taken over their business, but nothing turns on that. The third extension was granted by BSNMB.

On 7 November 1996, during the period of the third extension, BSNMB's assets and liabilities, following a sale of business, vested in the defendants by a vesting order under s 50(1) of the BAFIA when the name of the defendants was DCB Bank Bhd. So the defendants succeeded to the shares and the agreement in place of BSNMB.

A The fourth extension was granted by the defendants. It was from 4 April 1997 to 3 October 1997. It was subject to interest being serviced quarterly.

On 7 April 1997, during the fourth extension period, the plaintiffs wrote to the defendants to acknowledge that as at 3 April 1997, the end of
B the third extension period, their account stood at RM103,100,887.28, which comprised the balance purchase price of RM93,291,229.47 and interest thereon, less a sum that had been paid towards interest. The plaintiffs proposed to pay RM3,100,887.28 and to have the balance of RM100m treated as the principal sum, that is, as the balance purchase price. The defendants agreed that RM100m be capitalized from 4 April
C 1997 as the balance purchase price.

On 27 June 1997, the defendants wrote to the plaintiffs to remind them that interest on the RM100m amounting to RM2,292,404.88 for the first quarter, 4 April to 4 July 1997, would be due on 4 July. The plaintiffs, however, requested that that amount of interest be capitalized, and the
D defendants agreed, as they informed the plaintiffs by their letter dated 24 July.

The fourth extension period expired on 3 October 1997. The plaintiffs, unlike the case with extensions that had been given, did not apply for an extension of the period before its expiry.

E On 10 October 1997, after the expiry of the fourth extension period, the defendants informed the plaintiffs that a sum of RM104,765,728.32 was outstanding as at the end of the fourth extension period, 3 October 1997.

The defendants, however, did not take steps to terminate the agreement. Instead, there was a meeting on 4 November at which the
F plaintiffs promised to pay RM100,000 to reduce the interest due and the defendants gave the plaintiffs an opportunity to apply for a further extension. So, on 26 November, the plaintiffs paid RM100,000 and requested for an extension of another nine months. The defendants allowed an extension of another six months from 4 October 1997 to 3 April 1998. That was the fifth extension, which the defendants notified the plaintiffs of
G by their letter dated 2 December 1997. A term was imposed that interest was to be serviced monthly.

On 31 December 1997, during the fifth extension period, the defendants wrote to the plaintiffs demanding payment of interest overdue for the period of 5 July 1997 until 31 December 1997 which, with the
H payment of RM100,000, came to RM6,013,208.83. The balance outstanding as at 31 December 1997 was RM108,305,613.71, comprising RM100,000,000 principal, capitalized interest of RM2,292,404.88 up to 4 July 1997 as mentioned before, and the overdue interest of RM6,013,208.83.

On 3 April 1998, the fifth extension period expired with no prior
I request for another extension, but even though the plaintiffs did not pay the total amount outstanding, the defendants did not immediately take steps to terminate the agreement. Instead, on 9 June 1998, there was a meeting at

which it was agreed in principle to extend the period for full settlement and on 25 June 1998, the defendants wrote to ask the plaintiffs to submit a formal request for extension. There is no evidence of such a request, but still the defendants did not take steps to terminate the agreement until over a year later when, on 13 May 1999, they served on the plaintiffs a notice of termination of the agreement, asking them to pay the then outstanding sum of RM111,977,107.23 within 30 days, failing which the agreement would be terminated. It was a notice under cl 18.01 which entitled the defendants to terminate the agreement by giving 30 days' notice if the plaintiffs failed to complete by the extended completion date.

I should mention that according to the notice of termination, the outstanding sum comprised the balance purchase price of RM93,291,229.47, outstanding monthly interest that had been capitalized, amounting to RM6,708,770.53, and monthly interest of RM11,977,107.23 for the fifth extension period. The first two sums totalled RM100m.

To succeed in obtaining an injunction to restrain the defendants from disposing of the shares, the first thing that the plaintiffs must show is that there is a serious question to be tried whether the agreement had been validly terminated, because if the agreement had been validly terminated the defendants no longer owed any obligation to the plaintiffs in respect of the shares. The plaintiffs maintain that the notice of termination was null and void and unenforceable. Before I proceed to consider any of the reasons that the plaintiffs rely on for so maintaining, it is convenient to set out certain averments made by or on behalf of the plaintiffs in their basic affidavit dated 6 December 1999, that is the supporting affidavit accompanying their present application. It may be mentioned that all the affidavits made on behalf of the plaintiffs are affirmed by Dato' Choo Keng Weng, a director of theirs.

In para 3 of the basic affidavit, Dato' Choo says this:

> Sometime in April 1995, the plaintiff entered into negotiations to purchase the said shares from Rakyat Merchant Bankers Bhd ('Rakyat'). At the material time, I was given to understand by the then Assistant Governor of Bank Negara Malaysia ('BNM'), Dato' Abdul Murad Khalid ('Dato' Murad'), that BNM was acting as Rakyat's custodian for the purposes of effecting the sale of the said shares. BNM, through Dato' Murad, also acted as Rakyat's agent and/or custodian in initiating, negotiating and concluding the terms and conditions of the sale and purchase agreement.

It is a fact that on 3 March 1994, Bank Negara Malaysia ('BNM') assumed control of the whole of the property, business and affairs of RMBB and the conduct of the whole of RMBB's business and affairs. That was because BNM was satisfied that RMBB was insolvent and the minister of finance considered that the measure was necessary to avoid detriment to the interests of RMBB and its depositors. Those facts are evidenced by the Banking and Financial Institutions (Rakyat Merchant Bankers Bhd) (Assumption of Control) Order 1994 [PU(A) 72 of 1994] ('the Order') made under s 73(2)(a) of the BAFIA. The effect of the Order, according to s 76, was to remove the governance and powers of RMBB from the

directors and to place them entirely in the hands of BNM. By s 76(4) of the BAFIA, the directors were prohibited from engaging in any activity in relation to RMBB except as may be required or authorized by BNM.

BNM, therefore, apart from its functions as BNM, had, by virtue of the Order, the additional role as the governing organ of RMBB, in which role it may be regarded also as the custodian, alter ego or agent of RMBB.

In view of the assumption of control of RMBB by BNM, any negotiations for the sale of the shares to the plaintiffs and the setting of the terms and conditions of sale could only have been done with BNM or with a person empowered or authorized by BNM. Since Dato' Murad was the Assistant Governor of BNM, it is highly probable that he was the person empowered or authorized by BNM, not only to act for BNM in the matter of the sale of the shares as custodian or agent of RMBB, but also to actually see to the governance of RMBB.

The purpose of para 3 is to introduce Dato' Murad as RMBB's agent with whom the plaintiffs negotiated the sale of the shares and the terms and conditions of sale. It is certain that in law, the plaintiffs could only have negotiated with a person authorized by BNM and, as I have said, it is highly probable that the person was Dato' Murad. In fact, in para 5(c) of his affidavit dated 4 January 2000, Dato' Murad admitted his role in the sale. Although he said that he 'was merely facilitating both the plaintiff and the defendant in the completion of the sale', it is difficult to conceive how he could have come into that role if it were not that he was the person authorized by BNM, the alter ego of RMBB, to negotiate the sale on behalf of BNM and therefore on behalf of RMBB.

In para 5 of the basic affidavit, Dato' Choo says this:

> As agent and custodian of the assets of Rakyat, BNM represented to the plaintiff through Dato' Murad that:
>
> 5.1 BNM being the central bank would be in a position to do all things necessary to facilitate any reasonable proposal to restructure SHCB and expeditiously obtain the requisite approvals from the relevant authorities namely BNM, the Foreign Investment Committee ('FIC'), the Ministry of International Trade and Industry ('MIT') and the Securities Commission ('SC');
>
> 5.2 Rakyat would postpone the payment obligations of the plaintiff under the sales and purchase agreement pending the restructuring of SHCB.

Those are said to be representations made to the plaintiffs by Dato' Murad. Although the defendants' counsel has not raised this, I could not help noticing, when preparing this judgment, that the representation alleged in para 5.1, if it was made, would have been a representation as to what BNM would or could do as BNM, and not as the alter ego of RMBB. If Dato' Murad did make that representation, he could not have made it for BNM as agent or custodian of RMBB, and it could not therefore have been RMBB's representation made through Dato' Murad. RMBB cannot be regarded as representing to the plaintiffs that BNM could do those things. If the plaintiffs construed it as RMBB's representation, it was naive of them to rely on it because RMBB would not have been in a position to ensure that

BNM did those things. Therefore, in my opinion, the plaintiffs cannot use that representation against RMBB or, consequentially, against BSNMB and the defendants. If any cause could be maintained by the plaintiffs over that representation, which I shall refer to as 'the first precontractual representation', it would have to be one against BNM or Dato' Murad, because it was a representation of BNM as BNM.

Unlike the representation in para 5.1, that in para 5.2, if Dato' Murad did make it, would have been a representation by RMBB to the plaintiffs because it was a representation as to a matter within RMBB's power. I shall refer to the representation in para 5.2 as 'the second precontractual representation'.

The restructuring of SHCB mentioned in that paragraph was the restructuring that the plaintiffs intended to bring about by injecting revenue generating assets in SHCB in order to resuscitate the financially ailing company so as to render the plaintiffs' purchase of the shares a profitable venture.

In para 6 of the basic affidavit, Dato' Choo says that relying on and induced by the first and second precontractual representations, the plaintiffs executed the agreement, and explains that although the price stipulated in the agreement for the shares was higher than the market price, the plaintifffs were willing to pay a higher price for the shares because they relied on those representations and because the purchase of the shares would enable them to gain control of SHCB.

In para 8 of the affidavit, after speaking of the execution of the agreement and setting out its salient provisions, Dato' Choo says this:

> Further, it was orally agreed between the plaintiff and Rakyat that the date for completion of the sale and purchase agreement would be extended until the completion of the restructuring of SHCB provided that the plaintiff pays interest for the extended period at a rate to be agreed upon between the parties ('the oral agreement') from time to time.

I too shall refer to that alleged agreement as the 'oral agreement'.

In para 24 of his affidavit dated 28 January 2000, Dato' Choo says that he himself was a party to the oral agreement, but he does not specifically say that the other party was Dato' Murad acting on behalf of RMBB, although it may be assumed, from what Dato' Choo has said in paras 3 and 5 of the basic affidavit as to Dato' Murad's involvement, that he means to allege that the oral agreement was also made with Dato' Murad. Dato' Choo also does not state the date of the alleged oral agreement. In para 4.9 of their written submission, the plaintiffs say that the oral agreement was precontractual, meaning that it was made before the agreement. In para 12.2 of their written submission, the defendants say that the oral agreement came into being after the agreement. In view of the fact that in the plaintiffs' basic affidavit, the allegation as to the oral agreement comes after Dato' Choo has spoken of the execution of the agreement, I conclude that Dato' Choo means to allege that the oral agreement was made after the agreement.

In para 13 of the basic affidavit, after mentioning the several extensions of time granted to the plaintiffs for payment of the balance purchase price, Dato' Choo says this:

> Further, it was also subsequently agreed between the parties that the interest payable on the balance purchase price would be capitalized and paid together with the balance purchase price upon completion of the restructuring exercise. Consequently, the plaintiff was relieved from paying any further or additional interest for any future similar extensions until the completion of the restructuring exercise.

I shall refer to the alleged agreement as 'the Capitalization of Interest Agreement'.

The Capitalization of Interest Agreement, as its terms are worded in para 13, can be construed as an agreement about payment of interest on the balance purchase price, and also about payment of the balance purchase price itself. As to interest, the alleged agreement was that it was to be capitalized and paid only upon completion of the restructuring of SHCB. As to the balance purchase price, the alleged agreement was that it was to be paid also upon completion of the restructuring of SHCB, in which case it would have been another agreement in repetition of the alleged oral agreement.

For evidence of the Capitalization of Interest Agreement, Dato' Choo relies upon the correspondence exhibited to the basic affidavit and marked 'CKW–2'. I have perused the correspondence, from which I gathered some of the facts that I have set out regarding extensions of time and capitalization of interest, but I do not find that the correspondence provides evidence of the alleged Capitalization of Interest Agreement. The correspondence does provide evidence that interest was capitalized on occasions but there is no evidence of any agreement that the interest or the balance purchase price was to be paid only upon restructuring of SHCB.

In para 2.9 of their written submission, the plaintiffs rely on the first and second precontractual representations, the oral agreement and the Capitalization of Interest Agreement to argue that the notice of termination was in breach of the contract between the parties. As I said, the plaintiffs cannot rely, as against the defendants, on the first precontractual representation, and there is no evidence of the Capitalization of Interest Agreement. What is left to consider are, therefore, the second precontractual representation and the oral agreement.

In the basic affidavit, the plaintiffs' grounds for contending that the notice of termination was null and void and unenforceable are specifically set out in para 17. The first and foremost ground is that the notice of termination was in breach of the oral agreement. The plaintiffs do not, in that paragraph, rely on the failure to honour the second precontractual representation, but since the defendants' counsel has not objected to the reliance on it in submission by the plaintiffs' counsel, but instead has argued against it on other grounds, I shall take the second precontractual representation into consideration.

In para 4.8 of their written submission, the plaintiffs submit that the second precontractual representation and the oral agreement were in essence collateral agreements which existed side by side with the agreement and did not contradict it.

I am unable to agree that the second precontractual representation and the oral agreement did not contradict the agreement. Their effect, assuming that they were in fact made and that the defendants were bound by them, was that the defendants would not be able to terminate the agreement for non-completion until SHCB has been restructured. The effect was to contradict the agreement because according to the agreement, the defendants would be able to terminate it for non-completion if the plaintiffs failed to complete by the end of the first extension of six months.

That gives rise to the question whether evidence of the second precontractual representation and the oral agreement can be admitted. If it cannot, the plaintiffs cannot rely on them. The question arises because of s 92 of the Evidence Act 1950 and cl 20.01 of the agreement.

Section 92 has this effect on the agreement, that 'no evidence of any oral agreement or statement shall be admitted ... for the purpose of contradicting, varying, adding to, or subtracting from its terms', but the proviso to the section lays down several exceptions by virtue of which certain matters may be proved. The plaintiffs rely on exceptions (b) and (c) to contend that evidence of the second precontractual representation and the oral agreement can be admitted. Those exceptions are as follows:

> (b) the existence of any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document;
>
> (c) the existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

On the other hand, cl 20.01 of the agreement provided as follows:

> This agreement (together with any documents referred to herein) constitute the whole agreement between the parties hereto and it is expressly declared that no variation hereof shall be effective unless made in writing and agreed to by both parties.

The effect of that clause is that the agreement, because it constituted the whole agreement, could not be varied for any reason or under any circumstances except by another agreement in writing.

Therefore, relying as they do on exceptions (b) and (c), the plaintiffs, before they can aspire to overcome the hurdle of showing that the second precontractual representation and the oral agreement fall within exceptions (b) or (c), must first overcome the hurdle of showing that cl 20.01, which is designated in submission as the 'entire agreement clause', does not bar or disqualify them from attempting the first mentioned hurdle. In other words,

A the plaintiffs must first show that cl 20.01 does not prevent resort to exceptions (b) or (c). If it does, the question whether those exceptions allow admission of proof of the second precontractual representation and the oral agreement is immaterial.

The defendants' stand in effect is that the entire agreement clause
B excludes resort to any of the exceptions in s 92. They rely on *Inntrepreneur Pub Co Ltd v East Crown Ltd* (The Times Law Report, 5 September 2000) and *Hope v RCA Photophone of Australia Proprietary Ltd* (1937) 59 CLR 348. In the former case, an alleged oral collateral warranty was sought to be set up against a written agreement. The entire agreement clause in that case was differently worded from that in the present case and the attempt to set
C up the alleged collateral warranty was not made on the basis of statutory provisions such as the exceptions in s 92. In the latter case, the entire agreement clause also was worded differently from that in the present case, but I do not think that case is really pertinent to the present case because it concerned the question of the admission of oral evidence to establish the intention of the parties as regards a question arising in a written agreement
D — which was a question of construction — and not the question of contradicting or varying the written agreement by an oral agreement or statement.

The plaintiffs raised two arguments against the defendants' reliance on the entire agreement clause. The first is that the second precontractual
E representation and the oral agreement were separate collateral agreements which ran side by side with the agreement and did not contradict or vary it. I have already said that the second precontractual representation and the oral agreement did contradict the agreement. The other argument is that the entire agreement clause is no more than what is laid down in s 92. That clearly is not right. As I have indicated, the effect of the entire agreement
F clause was to exclude any variation of the agreement by an oral agreement. Any variation must be by another written agreement. But s 92 would allow the agreement to be contradicted or varied by an oral agreement or statement if it falls within any of the exceptions.

The plaintiffs have, therefore, not shown that the entire agreement
G clause does not disqualify them from attempting to resort to exceptions (b) or (c) in s 92.

My opinion is simply this. The entire agreement clause was an agreement between the plaintiffs and the defendants. In agreeing to the clause, the parties must be presumed to have known of the existence of s 92 and of the exceptions in it and to have intended what the clause intended,
H that is to exclude any attempt to vary the agreement by an oral agreement or statement, which attempt can only be made through the exceptions in s 92. By agreeing, therefore, to the entire agreement clause, the plaintiffs agreed not to resort to any of the exceptions in s 92. They cannot, therefore, be allowed to prove the second precontractual representation or the Oral
I agreement and to rely on them.

The plaintiffs rely on *Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor* [1992] 2 MLJ 68, where PS Gill J accepted evidence of an oral

promise despite the existence of an entire agreement clause in the written agreement in question. But PS Gill J's decision proceeded on the basis that the purpose of proving the oral promise was 'not to contradict, vary, add to or subtract from the terms of the agreement, but to prove the existence of a separate contractual provision', whereas in the present case I find that the second precontractual representation and the oral agreement, if there had been any, contradicted the agreement.

There is another point that I have to consider concerning the entire agreement clause. The plaintiffs initially dealt with the admissibility of the second precontractual representation and the oral agreement in paras 4.8–4.12 of their written submission. Six authorities were cited, including *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16, a Federal Court decision. In those paragraphs of their written submission, the plaintiffs do not discuss the cases and do not mention that they rely on certain exceptions in s 92 and what those exceptions are. It is the defendants who, in paras 9, 10, 11 and 12 of their written submission, deal with each likely exception in s 92 and argue that none of them applies. It is in the plaintiffs' written submission in reply to the defendants' written submission that expression is given to the plaintiffs' reliance on exceptions (b) and (c) for the admissibility of the second precontractual representation and the oral agreement (see para 8).

However, *Tan Swee Hoe*, one of the cases cited by the plaintiffs' counsel in their initial written submission, was not a decision on the exceptions in s 92. This is what the Federal Court said at p 19:

> In our view, those cases are strong authorities for the proposition that an oral promise, given at the time of contracting which induces a party to enter into the contract, overrides any inconsistent written agreement. This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead, it constitutes a separate contract which exists side by side with the main agreement.

The emphasis is on an overriding oral promise that induces a party to enter into a written contract.

One of the cases intended by that passage was *Dick Bentley Productions Ltd v Harold Smith (Motors) Ltd* [1965] 2 All ER 65. The Federal Court, at p 18, cited the following dictum of Lord Denning MR in that case:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice it that the representation was intended to be acted on and was in fact acted on.

The plaintiffs do not at all highlight or discuss *Tan Swee Hoe* in either of their written submissions. In para 13 of their written reply to the

A defendants' submission, they do say that 'the agreement was entered into on the basis and upon reliance of the precontractual promise' but they do not, to demonstrate the importance in law of that alleged fact, cite *Tan Swee Hoe*. Instead, they cite exception (c) in s 92 and *Plenitude Holdings*.

The principle in *Tan Swee Hoe* can only be considered in relation to the B second precontractual representation because it was what the plaintiffs allege induced them to enter into the agreement. It cannot be considered in relation to the oral agreement because, as I said, the oral agreement must have come after the agreement and could not have been a factor of inducement for the plaintiffs to enter into the agreement.

C I am left to consider whether evidence of the second precontractual representation, viewing it as an overriding oral promise that the plaintiffs say induced them to enter into the agreement and not simply as a contradiction or variation of the agreement, can be admitted despite the entire agreement clause. As is to be expected from the plaintiffs' neglect to discuss *Tan Swee Hoe*, they have not addressed that question, and therefore neither have D the defendants. *Tan Swee Hoe*, and I believe the cases considered in it, including *Dick Bentley*, were cases that did not involve an entire agreement clause.

The defendants' counsel has furnished me with a copy of the approved E judgment in the case of *The Inntrepreneur Pub*, in which Lord Denning LJ's dictum in *Dick Bentley* that I have quoted was considered in para 11 when Lightman J was considering, on the assumption that the entire agreement clause did not preclude the setting up of the alleged oral collateral warranty, whether the collateral warranty was ever given. Of course, if the collateral warranty was in fact given, then, according to the authorities, including *Dick* F *Bentley*, it would have to be given force to. But Lightman J decided that the entire agreement clause precluded the setting up of the collateral warranty. This is what he said:

> The purpose of an entire agreement clause is to preclude a party to a written G agreement from threshing through the undergrowth, and finding, in the course of negotiations, some (chance) remark or statement (often long forgotten or difficult to recall or explain) on which to found a claim such as the present, to the existence of a collateral warranty. The entire agreement clause obviates the occasion for any such search and the peril to the contracting parties posed by the need which may arise in its absence to conduct such a search. For such a clause constitutes a binding agreement H between the parties that the full contractual terms are to be found in the document containing the clause and not elsewhere, and that accordingly, any promises or assurances made in the course of the negotiations (which in the absence of such a clause might have effect as a collateral warranty) shall have no contractual force, save insofar as they are reflected and given effect in that document. The operation of the clause is not to render evidence of the I collateral warranty inadmissible in evidence as is suggested in *Chitty on Contract* (28 Ed) Vol 1 paras 12–102: it is to denude what would otherwise constitute a collateral warranty of legal effect.

In the absence of submission by the plaintiffs on this specific point, I can do no better than follow the decision in *The Inntrepreneur Pub.* Taking the second precontractual representation as a collateral warranty, according to the decision, the entire agreement clause denuded it of legal effect. A

In case I am wrong in my opinion as to the effect of the entire agreement clause on the second precontractual representation and the oral agreement, I shall proceed to consider whether they fell within exceptions (b) or (c) in s 92. Those exceptions concern 'any separate oral agreement'. I do not think that the precontractual representation, being merely a representation, was an 'agreement', but I do not think that it should make any difference to the plaintiffs that it was not and therefore did not fall within those exceptions, because there is still the oral agreement, and as far as concerns the question of termination of the agreement, the effect of the oral agreement alone would do just as well. B C

It is clear that the oral agreement did not fall within exception (b). It was, if it existed, an agreement as to the time when the plaintiffs were bound to complete the agreement, which is not a matter as to which the agreement was silent. It was voiced in cll 11 and 12. D

To fall within exception (c), the oral agreement must constitute 'a condition precedent to the attaching of any obligation' under the agreement. By the oral agreement, if it did exist, the parties agreed in effect that before the plaintiffs would be obliged under the agreement to complete it, SHCB should first be restructured. The restructuring of SHCB was the condition precedent to be fulfilled before the plaintiffs could be attached with the obligation to complete. Prima facie, therefore, the oral agreement fell within exception (c). E

The defendants give two reasons in para 12 of their written submission in reply for contending that the oral agreement did not fall within exception (c). F

The first is that resort to exception (c) would mean that the agreement cannot be enforced because a condition precedent 'to the agreement', to quote the defendants' words in para 12.1, has not been fulfilled and therefore the plaintiffs are not entitled to specific performance of it, which is one of the reliefs that they seek in this action. I think that if the matter went for trial and the plaintiffs succeeded in showing that by virtue of the oral agreement, the agreement was wrongly terminated, they would succeed in getting the declarations sought in prayers 1, 2 and 3 in the statement of claim, and the fact that their contention that they are not bound to complete until SHCB is restructured may present a difficulty in the way of their claim for specific performance in prayer 5, should not invalidate the contention. G H

The second reason is that the oral agreement came into being after the agreement. Therefore, it could not form a condition precedent 'to the agreement', again to quote the defendants' words in para 12.2. It should be noted that for exception (c), the condition precedent is to 'the attaching of I

any obligation' under the contract in question, not a condition precedent to the contract itself. In my judgment, it is not necessary for exception (c) that the oral agreement precedes the written agreement in question. The written agreement may provide for an obligation on a party. The parties may, by a subsequent oral agreement, agree that the obligation should attach to the party in question only after a certain condition has been fulfilled. That would be a condition precedent to the attaching of the obligation.

So, were it not for the entire agreement clause, in my opinion the plaintiffs may prove the existence of the oral agreement to argue that the notice of termination of the agreement was in breach of the oral agreement and was therefore void and unenforceable. But, in view of the entire agreement clause, they cannot bring in the oral agreement and they fail on their foremost ground for contending that the notice of termination was null and void.

Paragraph 17 of the plaintiffs' basic affidavit sets out several other reasons why the notice of termination is contended to be null and void and unenforceable. But in their written submission, only one of those reasons has been submitted on, and that is in para 2.10, and I think I need only deal with that reason. The plaintiffs say that with the several extensions that were given for payment of the balance purchase price, time was no longer of the essence, and to make time of the essence again it was incumbent on the defendants to give the plaintiffs a reasonable time, at least six months, to pay a sum as large as almost RM112m, and not only 30 days, which was therefore unreasonable.

In my opinion, time continued to be of the essence even with the extensions. Clause 12.03 of the agreement provided that 'whenever time is extended for payment of the balance of the purchase price, the completion date for the purpose of this agreement shall be construed accordingly'. Each extension was until a fixed date which became the new completion date. The completion date kept being extended but the new time for completion continued to be of the essence. The position was no different from what it would have been had there been a refusal to grant a further extension after the first extension as of right. There would have been an entitlement to give a 30 day notice of termination. With the fifth extension, the completion date was 3 April 1998. The plaintiffs failed to pay the balance purchase price. The defendants then would have been entitled under cl 18.01 to terminate the agreement by giving 30 days' notice, which they did only one year later, on 13 May 1999. It is true that on 25 June 1998 there was a decision in principle to give a further extension but that was subject to the plaintiffs' making a formal request, which they did not. So, the completion date remained 3 April 1998. It is unreasonable of the plaintiffs, after enjoying a period of one year of freedom from demand by the defendants, to expect the defendants, when they eventually decided to give the notice of termination, to give the plaintiffs another six months to pay.

To conclude, I find there is no serious question to be tried as to whether the agreement was validly terminated. I find it was validly terminated. The

plaintiffs are therefore not entitled to the interlocutory injunction that they seek and I dismiss their application with costs. A

Plaintiffs' application dismissed with costs

Reported by Chew Phye Ken

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